UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,	:	Docket No. 14-3599
Appellee,	:	AFFIRMATION IN OPPOSITION TO MARTOMA'S MOTION
- v. -	:	FOR BAIL PENDING APPEAL
MATHEW MARTOMA,	:	
Defendant-Appellant.	:	

STATE OF NEW YORK	)	
COUNTY OF NEW YORK	:	ss.:
SOUTHERN DISTRICT OF NEW YORK	)	

EUGENE INGOGLIA, pursuant to Title 28, United States Code, Section 1746, hereby affirms under penalty of perjury:

1. I am an Assistant United States Attorney in the Office of Preet Bharara, United States Attorney for the Southern District of New York. I represented the Government in the proceedings in the District Court, and I represent the Government in this appeal. I submit this affirmation in opposition to Mathew Martoma's motion for bail pending appeal.

PRELIMINARY STATEMENT

2. Superseding Indictment S1 12 Cr. 973 (PGG) (the "Indictment") was filed on August 22, 2013, in three counts. Count One charged Martoma with conspiracy to commit securities fraud, in violation of Title 18, United States Code, Section 371. Counts Two and Three each charged Martoma with securities fraud, in violation of Title 15, United States Code, Sections 78j(b) and 78ff; Title 17, Code of Federal Regulations, Sections 240.10b-5 and 240.10b5-2; and Title 18, United States Code, Section 2.

3. Trial commenced on January 7, 2014, and ended on February 6, 2014, when the jury found Martoma guilty on all counts.

4. On September 8, 2014, Judge Gardephe sentenced Martoma to an aggregate term of nine years' imprisonment, to be followed by three years of supervised release, imposed a $300 mandatory special assessment, and ordered Martoma to forfeit $9,380,322. Judge Gardephe also ordered Martoma to surrender on November 10, 2014.

5. On October 3, 2014, Martoma moved for bail pending appeal. On October 20, 2014, Judge Gardephe denied that motion.

6. On October 29, 2014, Martoma moved for bail pending appeal before this Court, and also sought a stay of his surrender date. On November 4, 2014, this Court granted Martoma's request for a stay of his surrender date until such time as may be set by this Court or by the District Court on remand following a decision on Martoma's bail motion.

STATEMENT OF FACTS

7. From the summer of 2006 to July 29, 2008, Martoma served as a portfolio manager at SAC Capital. (Tr. 112-17, 434-35).[1] During this period, two doctors, Sidney Gilman and Joel Ross, disclosed material, non-public information to Martoma concerning the Phase II clinical trial of a drug called "bapineuzumab" (the "Drug Trial"). These improper disclosures included the clinical trial's final results on efficacy, which were not publicly disclosed until the International Conference on Alzheimer's Disease (the "ICAD conference") on July 29, 2008 (the "Public Announcement"). Pursuant to confidentiality agreements, both doctors had been given access to confidential information about the study because of their roles in the clinical trial. Dr. Gilman was the chair of the study's Safety Monitoring Committee (the "SMC") and was selected

[1] "Tr." refers to the trial transcript; "GX" refers to a Government exhibit at trial; "Br." refers to the brief filed with Martoma's motion for bail pending appeal; and "Ex." refers to an exhibit filed with that brief.

to present the Drug Trial results at the Public Announcement, while Dr. Ross was one of the study's clinical principal investigators. (Tr. 568, 1168).

8. Over a two-year period, Martoma cultivated relationships with Dr. Gilman and Dr. Ross through expert networking agencies. (Tr. 557, 588, 1231-32). Dr. Gilman was paid approximately $1,000 an hour to speak with Martoma about treatments for Alzheimer's disease through the Gerson Lehrman Group ("GLG"). (Tr. 1228, 1543). Dr. Gilman had at least 43 consulting sessions with Martoma (mostly over the telephone), which was many more than Gilman had with any other person who consulted with him (more than four times as many as the person with whom he had the second most consultations). (GX 600, 601, GX 603). One of the reasons that Dr. Gilman did these consultations was to obtain money. (Tr. 1828). Dr. Ross, too, was paid for consultations with Martoma (Tr. 613), which he did both for this fee and to obtain Martoma's help developing industry contacts. (Tr. 555-56, 626-27, 630, 684; GX 350, 366, 980).

9. Martoma was aware that the doctors were paid for each consulting session with him, in part because he was required to obtain prior approval from GLG for each consulting session. (Tr. 1031, 1540, 1545; GX 200, 202, 234, 852). Further, Martoma was aware of SAC's agreement with GLG and related pricing, because the cost of consulting services provided by GLG experts was charged to the portfolio that Martoma managed. (Tr. 2106).

10. Over time, Dr. Gilman developed a real friendship with Martoma. (Tr. 1237-40, 1488-89, 1893; GX 235). Although they lived in different cities, Martoma told Dr. Gilman that he "wanted to be friends" (Tr. 1236); they met to have coffee (Tr. 1237); and Martoma talked with Gilman "about his family, about his wife, about having children in fairly rapid succession, and . . . about his parents emigrating from India" (Tr. 1237-1238).

11. In exchange for the fees and friendship he got from Martoma, Dr. Gilman regularly shared the confidential safety data disclosed at the SMC meetings with Martoma, generally on the day of the meeting or the following day. (Tr. 1272-76; GX 209, 210, 211, 212, 213, 601, 1211). Throughout this period, Martoma (in an SAC portfolio he controlled) and SAC Capital (in other portfolios, principally on Martoma's recommendation) amassed large positions in securities in Elan and Wyeth, which were both pharmaceutical companies that had sponsored the Drug Trial. (Tr. 124-25, 130, 472-83, 2267; GX 431, 436, 565-C, 1256, 1260).

12. At the conclusion of the Drug Trial, Elan requested that Dr. Gilman present the results at ICAD, in Chicago, on July 29, 2008. (Tr. 1396). Dr. Gilman was shown the data from the trial on July 15 and July 16, 2008. (Tr. 1413). The final efficacy results of the Drug Trial signaled that bapineuzumab would not be as effective to treat Alzheimer's disease as had been expected. (Tr. 692, 703, 1420-24). Elan provided the data to Dr. Gilman in the form of a draft PowerPoint presentation, and on July 17, 2008, he went through the data in the PowerPoint slides with Martoma by telephone during a call that evening lasting an hour and forty-five minutes. (Tr. 1424, 1439; GX 1211). That same day, Martoma bought a round-trip airline ticket from New York to Detroit, Michigan, for Saturday, July 19, 2008. (Tr. 1950, 1952; GX 1307, 1308). On Saturday, July 19, 2008, as scheduled, Martoma flew to Detroit, and took a cab from the Detroit airport to the University of Michigan's campus. (Tr. 1453-56, 1968-69; GX 1210, 1307, 1400, 1401, 1402). There, Martoma met with Dr. Gilman (Tr. 1453-56), who showed Martoma the PowerPoint slides containing the efficacy results, and discussed the data with him in detail. Following this meeting, Martoma flew back to New York the same day. (Tr. 1952-53; GX 1307).

13. The next morning, July 20, 2008, Martoma sent an email to the principal of SAC Capital, Steven A. Cohen, asking whether the two could speak by telephone that morning. (GX

459). In the subject line, Martoma wrote, "It's important." (GX 459). Cohen responded by emailing Martoma his phone number, and the two subsequently had a 20-minute conversation. (GX 459, 1215). Martoma then sent Cohen an email summarizing the size of the Elan and Wyeth positions in two accounts. (GX 460). The next day, Monday, July 21, 2008, SAC Capital began selling the approximately $700 million in Elan and Wyeth securities it was holding, and also entered into significant short-sale transactions. (Tr. 151-52, 520-22, 2266-67, 2272-75, 2279-80, 2282-93, 2385, 2387, 2490; GX 431, 432, 436, 554-C, 1256, 1260).

14. On July 28, 2008, Elan disclosed the Drug Trial's results at an evening confidential presentation for Dr. Ross and others who worked on the drug trial. Martoma met Dr. Ross immediately after the presentation, as he had previously arranged, in the lobby of the hotel where the presentation took place. (Tr. 714; GX 367, 375, 529). Dr. Ross told Martoma that bapineuzumab had not shown efficacy in treating Alzheimer's disease, and they discussed some of the data that had just been disclosed at the dinner. (Tr. 715-17). During this discussion, Martoma appeared to Dr. Ross already to know all the details of the data, as if Martoma had been "in the room" during the disclosure. (Tr. 715-17).

15. The next day—July 29, 2008—Dr. Gilman presented the bapineuzumab efficacy results at the ICAD conference. (Tr. 2381, 2395-96). Elan's stock price began dropping even before Dr. Gilman had completed his presentation. (Tr. 2381, 2396; GX 1263). Ultimately, Elan's stock price dropped approximately 42% by the end of the following day. (Tr. 2379). Wyeth's stock price suffered a decline of about 12% during the same period. (Tr. 2383).

16. As a result of the trades in Elan and Wyeth securities during the week leading up to the ICAD conference, SAC Capital made profits from the short sales and avoided losses

totaling approximately $275 million. (Tr. 2391; GX 1268). Martoma received a $9.3 million bonus based entirely on his and SAC Capital's trading in Elan and Wyeth. (GX 555, 556).

ARGUMENT

Martoma's Motion for Bail Pending Appeal Should Be Denied

17. Martoma claims that he intends to argue on appeal that Judge Gardephe improperly precluded him from introducing (a) expert opinion testimony that Elan stock was overvalued in July 2008 (Br. 7-11), and (b) Cohen's prior deposition testimony before the SEC in which Cohen gave reasons for his Elan and Wyeth trades (Br. 11-18). Martoma also claims he intends to argue that the evidence at trial was insufficient to demonstrate that Dr. Gilman received a benefit for the disclosure of inside information to Martoma. (Br. 18-20). None of these claims—all of which this Court reviews deferentially—raises a substantial question of law or fact. To the contrary, Judge Gardephe did not abuse his discretion in precluding Martoma's hired expert from opining that Elan was overvalued in July 2008 because that opinion was not relevant to Martoma's state of mind, and in any event numerous other documents in evidence and witness testimony provided a basis for Martoma to make this argument, which the jury was readily able to understand without the expert's opinion testimony. Judge Gardephe also did not abuse his discretion in precluding the introduction of Cohen's SEC testimony (which, as Judge Gardephe observed, was by no means exculpatory), because that testimony was taken by a different party—the SEC—for a distinct investigative purpose. In any event, even if Judge Gardephe abused his discretion in precluding defense evidence, any error was harmless in light of the overwhelming evidence of Martoma's guilt. Finally, abundant evidence established that Dr. Gilman received both financial and intangible benefits for providing inside information to Martoma. Thus, Martoma has failed to carry his burden of showing that his appeal raises a

substantial question of law likely to alter the judgment of conviction, as required for this Court to order bail pending appeal, and this Court should therefore deny the motion.

A. Applicable Law

18. The standards governing release pending appeal are set forth in Title 18, United States Code, Section 3143(b), which provides that a court "shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment" be detained pending appeal unless the judicial officer finds "by clear and convincing evidence that the person is not likely to flee or pose a danger to any other person or the community if released," and "that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in—(i) reversal, (ii) an order for a new trial, (iii) a sentence that does not include a term of imprisonment, or (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process." 18 U.S.C. § 3143(b).

19. That provision gives effect to Congress's view that "[o]nce a person has been convicted and sentenced to jail, there is absolutely no reason for the law to favor release pending appeal or even to permit it in the absence of exceptional circumstances." *United States* v. *Miller*, 753 F.2d 19, 22 (3d Cir. 1985) (quoting H. Rep. No. 907, 91st Cong., 2d Sess. 186-87 (1970)). Following a guilty verdict and sentencing, there is a "presumption in favor of detention." *United States* v. *Abuhamra*, 389 F.3d 309, 319 (2d Cir. 2004). It is the defendant's burden to "rebut that presumption with clear and convincing evidence." *Id.*

20. A "substantial question" is "a 'close' question or one that very well could be decided the other way." *United States* v. *Randell*, 761 F.2d 122, 125 (2d Cir. 1985) (quoting *United States* v. *Giancola*, 754 F.2d 898, 901 (11th Cir. 1985)). "If a court does find that a question raised on appeal is 'substantial,' it must then consider whether that question is 'so

integral to the merits of the conviction on which defendant is to be imprisoned that a contrary appellate holding is likely to require reversal of the conviction or a new trial.'" *Id.* at 125 (quoting *United States* v. *Miller*, 753 F.2d at 23). With respect to all of these issues, "the burden of persuasion rests on the defendant." *Id.*

B. Judge Gardephe Properly Excluded Defense Expert Opinion Testimony

21. Martoma argues that Judge Gardephe erred by declining to permit Paul A. Gompers, a professor retained by the defense, from testifying that in his expert opinion shares in Elan securities were overvalued in July 2008. (Br. 7). Contrary to this claim, Judge Gardephe's decision not to permit Gompers to testify to this opinion was correct, for multiple reasons. First, this testimony was neither relevant nor helpful to the jury, where Gompers' post-hoc opinion shed no light on Martoma's state of mind in the summer of 2008, and where other evidence in the record permitted Martoma to make the argument that Elan was overvalued in July 2008, which the jury was fully capable of understanding without Gompers' testimony. Second, whatever minimal probative value Gompers' proffered testimony possessed was outweighed by the unfair prejudice it caused, as it risked confusing the jury. Third, even if Gompers' testimony should not have been excluded, any error was harmless, given the overwhelming evidence of Martoma's guilt.

22. Rule 702 of the Federal Rules of Evidence provides that, where "specialized knowledge will assist the trier of fact," an expert witness may give opinion testimony if "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." Fed. R. Evid. 702. District courts have a "gatekeeping" function of ensuring that expert testimony "rests on a reliable foundation" and is "relevant to the task at hand,"

Amorgianos v. *Romano Enterprises*, 303 F.3d 256, 267 (2d Cir. 2002) (citation and internal quotation marks omitted), and assists the jury by shedding light on activities not within the common knowledge of the average juror, *see United States* v. *Wexler*, 522 F.3d 194, 204 (2d Cir. 2008); *United States* v. *Castillo*, 924 F.2d 1227, 1232 (2d Cir. 1991); *United States* v. *Collins*, --- F. App'x ---, 2014 WL 5351610, at *1-*2 (2d Cir. Oct. 22, 2014). A district court's determination regarding the admission of expert testimony "is not an abuse of discretion unless it is 'manifestly erroneous.'" *United States* v. *Cruz*, 363 F.3d 187, 192 (2d Cir. 2004) (quotation and citation omitted). Even if admissible under Rule 702, expert testimony is still subject to exclusion under Rule 403 if "its probative value is substantially outweighed by the danger of unfair prejudice." *United States* v. *Castillo*, 924 F.2d at 1232 n.9 (internal quotation marks omitted). Moreover, an erroneous evidentiary ruling should be disregarded if the error is harmless. Fed. R. Crim. P. 52(a) ("[a]ny error... which does not affect substantial rights shall be disregarded"); *see also, e.g.*, *United States* v. *Abreu*, 342 F.3d 183, 190 (2d Cir. 2003) ("[W]e will not order a new trial because of an erroneous evidentiary ruling if we conclude that the error was harmless.").

23. Judge Gardephe did not commit a manifest error in precluding Gompers from testifying that in his opinion, which was formed after the fact, Elan stock was overvalued in July 2008. As Judge Gardephe found, "Professor Gompers's *post hoc* conclusion that the market for Elan and Wyeth stock was in fact 'overheated' in July 2008 is not probative of Martoma's state of mind because it would not assist the jury in understanding what Martoma was thinking at the time." (Ex. F at 4-5). Further, as Judge Gardephe noted, Judge Gardephe had permitted Martoma to introduce "numerous analyst reports" from July 2008 asserting "that Elan stock is overpriced" (Ex. F at 4), and Gompers' testimony would have done nothing more than recapitulate this

evidence, which the jury could understand on its own. *See, e.g.*, *United States* v. *Collins*, 2014 WL 5351610, at *2 (affirming district court's decision precluding defense expert in securities fraud trial from opining on the materiality of a document where "fact witnesses proved sufficient" for the defendant to "present the defense view" of materiality, which "was within the competence of a jury unassisted by opinion testimony"). Further still, Judge Gardephe correctly concluded that under Rule 403, the probative value of Gompers' testimony was substantially outweighed by the danger of unfair prejudice where it presented a "significant risk of confusing the jury" by shifting the question to "whether—in January 2014—it can be determined that" the stock was overvalued. (Ex. F at 6). On the whole, this record makes plain that Judge Gardephe did not rule "in an arbitrary and irrational fashion." *United States* v. *Dhinsa*, 243 F.3d 635, 649 (2d Cir. 2001).

24. In contending that Judge Gardephe committed manifest error, and that this error is a substantial legal issue for appeal, Martoma argues that Gompers' opinion that Elan shares were overvalued was relevant to show that "the stock price decline on July 30, 2011 did not result from previously undisclosed material information" and instead that "the stock price declined at that time because the market had been overheated." (Br. 8). But as Judge Gardephe correctly found, Gompers' opinion that "Elan stock was generally overheated in the two months prior to the public disclosure" of the Drug Trial results "does not make it any more or less likely that the announcement of those results at the ICAD conference triggered the sudden decline in the stock price." (Ex. F at 9). Further, as noted, Martoma was able to make this argument without Gompers' opinion, based on other evidence in the record, and it was within the competence of the jury to assess it. *See United States* v. *Collins*, 2014 WL 5351610, at *2; *Castillo*, 924 F.2d at 1232.

25. Martoma also argues that Gompers' expert opinion was relevant to Martoma's "state of mind," and that Judge Gardephe erred in finding otherwise. But Judge Gardephe's decision that Gompers' post-hoc analysis "would not assist the jury in understanding what Martoma was thinking at that time" was correct (Ex. F at 4-5), because Gompers did not, in July 2008, have a known opinion about Elan's supposed overvaluation, much less share this opinion with Martoma. Martoma claims that "[e]vidence substantiating the view that someone *in Martoma's shoes* would have taken the same actions for innocent reasons has at least some tendency to show that Martoma did so" (Br. 9, emphasis added), but this claim ignores the fact that the post-hoc opinion of Martoma's hand-picked expert is hardly that of someone "in Martoma's shoes." Martoma falls back on a simple analogy, asserting that the "fact" Elan was overvalued in July 2008 independently makes it more likely that Martoma believed Elan was overvalued, just as the fact that it rained on a particular day "makes it more likely that someone believed it was raining." (Br. 9-10). But the fact that it rained on a particular day has no tendency in and of itself to make it more or less likely that a person believed it was raining on that day unless the person experienced the weather or received information from someone who did. Thus, Judge Gardephe's decision to admit the evidence of what Martoma experienced and learned from others at the time, but to exclude Gompers' post-hoc opinion, was not manifestly erroneous.

26. Even if Judge Gardephe erred in excluding Gompers' expert opinion testimony, any error was harmless. As noted, Martoma offered a wealth of evidence—in the form of contemporaneous analyst reports and other documents (*e.g.*, DX 9-A, DX 20-A) —supporting his contention that Elan was overvalued before the results of the Drug Trial were publicly announced. Indeed, Gompers himself was permitted to read and explain these analyst reports in his testimony, and did so at great length, emphasizing that certain analysts in June and July 2008

believed that investors should sell Elan shares prior to the Drug Trial announcement. (Tr. 2582 – 2606, attached as Exhibit A). And Martoma argued the point, citing Gompers' testimony, in summation. (Tr. 3102, 3104).

27. Moreover, there was overwhelming evidence that Martoma did not share this bearish view. To the contrary, in the weeks leading up to the announcement, Martoma sent a weekly position report to Cohen and others stating precisely the opposite of Gompers's later-formed view: that Martoma believed—on a 9 out of 10 confidence level—that Elan shares would *increase* in value after the Drug Trial announcement and that SAC should remain long in the position. (GX 291, 452). Finally, as the Government argued in rebuttal (Tr. 3143-3144), even if Martoma had in fact developed concerns that the Elan stock price was buoyed by irrational enthusiasm, an early preview of Drug Trial results that did not comport with the exceedingly high expectations would have simply provided *extra* motivation to sell the position off promptly, and was in no way inconsistent with the Government's theory. Thus, Gompers' testimony would not have altered in any way the overwhelming evidence of Martoma's guilt. For all of these reasons, there is a "fair assurance" that the jury's "judgment was not substantially swayed" by the preclusion of Gompers' expert opinion testimony and that, as a result, any error was harmless. *United States* v. *Yousef*, 327 F.3d 56, 157 (2d Cir. 2003).

C. Judge Gardephe Properly Excluded Cohen's Former Testimony

28. Martoma argues that Judge Gardephe "committed clear legal error by excluding Cohen's former testimony during a parallel SEC investigation" that Cohen took direction on the Wyeth investment from a former employee and that Cohen gave the direction that the trades be made in a secret manner. (Br. 11-12). But this testimony was taken prior to the filing of charges and the development of evidence here by an agency—the SEC—that at that time had an

investigatory motive rather than the motive of the trial prosecutors during cross-examination. In these circumstances, Judge Gardephe's decision to exclude Cohen's prior testimony was not an abuse of discretion. Further, any error was harmless given the minimal value of that evidence (which was in many ways inculpatory) to Martoma and the overwhelming evidence of Martoma's guilt.

29. Under Federal Rule of Evidence 804(b)(l), an unavailable declarant's testimony at a prior proceeding is admissible if it is "offered against a party who had . . . an opportunity and similar motive to develop it" in the prior proceeding. Fed. R. Evid. 804(b)(1). In order to satisfy these requirements, the proponent of the prior testimony must establish that the party against whom the testimony is offered was a party to the prior proceeding, "is on the same side of the same issue at both proceedings, . . . [and] had a substantially similar interest in asserting that side of the issue." *United States* v. *DiNapoli*, 8 F.3d 909, 912 (2d Cir. 1993) (en banc). "Where both proceedings are trials and the same matter is seriously disputed at both trials, it will normally be the case that the side opposing the version of a witness at the first trial had a motive to develop that witness's testimony similar to the motive at the second trial." *Id.* "The situation is not necessarily the same where the two proceedings are different in significant respects, such as their purposes or the applicable burden of proof." *Id.* at 913.

30. Judge Gardephe correctly excluded Cohen's SEC testimony here. First, the two proceedings involved different parties: the SEC and the United States Attorney's Office for the Southern District of New York (the "USAO"), which even when involved in parallel proceedings, are different agencies with different interests and missions. *See United States* v. *Rigas*, 583 F.3d 108, 126 (2d Cir. 2009) (affirming district court's determination that the Government's discovery obligation did not extend to documents in the possession of the SEC).

Second, the proceedings were different in nature and purpose because, as Judge Gardephe found, "the SEC's motive to cross-examine Cohen at the investigative deposition is not comparable to the motive that the USAO would have to cross-examine him at Martoma's trial." (Ex. G at 9). *See United States* v. *Whitman*, 555 F. App'x 98, 103 (2d Cir. 2014) ("Assuming arguendo that the SEC lawyers and the trial prosecutors [from the USAO] can be treated as the same party, the district court reasonably concluded that they had differing motivations to develop testimony by cross-examination."). This decision was not an abuse of discretion.

31. Martoma relies principally on *United States* v. *Sklena*, 692 F.3d 725 (7th Cir. 2012) and argues that that case—which involved the Commodity Futures Trading Commission ("CFTC") and the Department of Justice ("DOJ")—shows that the SEC and the USAO here were the "same party" and had a "similar motive to develop Cohen's testimony." (Br. 13-15). But *Sklena* bears no resemblance to this case. As to the question of whether the same parties are involved, as Judge Gardephe found, *Sklena* involved the CFTC, which "is required by statute to report on its litigation activities directly to the Justice Department." (Ex. G at 10 n.1). By contrast, here, "the SEC has complete autonomy in civil prosecutions and is not required to report on its activities to the USAO." (Ex. G at 10 n.1). As to the question of whether the parties here had similar motives to develop Cohen's testimony, in *Sklena*, as Judge Gardephe observed, "the CFTC had already brought an action against [the deponent] at the time it took his deposition," so "[i]t was thus obvious . . . that portions of his testimony might be admitted at trial." (Ex. G at 10 n.1). Thus, this "was not an investigatory deposition of the sort at issue here, but a deposition of a defendant in an action already brought," and "the CFTC had every motive to conduct an extremely thorough examination." (Ex. G at 10 n.1). By contrast, in the present case, "[t]he SEC did not have a comparable motive . . . in conducting the investigatory

deposition of Cohen." (Ex. G at 10 n.1). In short, *Sklena*, which is not binding in any event, involved different parties than those in this case, with different motives than those of the parties here. *Sklena* is entirely inapposite.

32. This case bears a greater resemblance to *United States* v. *Whitman*, in which this Court upheld a district court's decision to preclude the defendant in an insider trading case from reading into the record the prior deposition of an alleged tipper taken during an SEC civil investigation, in which the tipper denied passing inside information to the defendant. *See* 555 F. App'x at 103. Specifically, this Court held that even assuming the SEC lawyers could be treated as the "same party" as the trial prosecutors, "they had differing motivations to develop testimony by cross-examination" because "the SEC deposition was taken with an investigatory motive that differed from the adversarial motive that would be present at trial." *Id.*

33. Similarly, here, the SEC's motive in taking Cohen's testimony was investigatory, and was different from the adversarial motive that would have been present at trial. *See id.* Indeed, the SEC conducted its investigative deposition of Cohen before much of the evidence that was introduced at Martoma's trial was developed, including—critically—Dr. Gilman's admission that he had provided the final efficacy results of the Drug Trial to Martoma before those results were publicly announced. Martoma has pointed to nothing that contradicts this conclusion. (Br. 11-16). Instead, Martoma attempts to distinguish *Whitman* in just a sentence, asserting (without offering any basis) that it "did not involve nearly the same level of close coordination between the prosecutor and the SEC as in this case." (Br. 16). But the degree of coordination, even if it bears on whether the SEC and USAO should be treated as the "same party," does not change the fact that at the point in time when Cohen was deposed, the SEC's motive was investigatory, where charges had not yet been brought and evidence had not yet been

developed. Martoma also suggests that the "conflict[]" between *Whitman* and *Sklena* shows there is a substantial legal issue here. (Br. 16). But that position overstates any "conflict" between *Whitman* and *Sklena*, which involved entirely different facts. More importantly, that position overstates the issue here, which is simply whether Judge Gardephe abused his broad discretion to make evidentiary rulings in precluding Cohen's former testimony. In light of this Court's decision in *Whitman*, Judge Gardephe's decision was not an abuse of discretion.

34. In any event, any error was harmless. Contrary to Martoma's assertions, Cohen's testimony in no way exculpated Martoma. Rather, as Judge Gardephe found, "[g]iven that Cohen testified that Martoma played an important role in Cohen's decision to accumulate Elan and Wyeth stock, and in Cohen's decision to sell the Elan position in July 2008, much in Cohen's deposition is inculpatory of Martoma." (Ex. G at 3 n.1). Further, Cohen's testimony that he recalled another individual, Wayne Holman, recommending the sale of Wyeth does not even exculpate Martoma. As Judge Gardephe observed, Cohen testified that Holman's Wyeth recommendation came after Holman had – at Cohen's direction – spoken to Martoma about Martoma's views on the Elan position and "reported back" to Cohen on the conversation. (Ex. G at 4 n.1.). Indeed, Cohen and SAC ultimately financially credited Martoma—and not Holman—with profits from Wyeth trading in July 2008 (Tr. 526; GX 555, 556). Moreover, the evidence that Martoma sold Elan and Wyeth securities based on the early preview of the Drug Trial results he received from Dr. Gilman and made a recommendation to Cohen to do the same was overwhelming, and was in no meaningful way undermined by Cohen's deposition testimony.

D. Sufficient Evidence Established That the Tipper Received a Benefit

35. Martoma asserts that there is a substantial question for appeal of whether sufficient evidence at trial proved that the tipper, Dr. Gilman, received a personal benefit. In

pressing this challenge, Martoma ignores much of the evidence establishing this benefit, and views the evidence he does address in the light most favorable to himself. When properly considered in the light most favorable to the Government the evidence conclusively established that Dr. Gilman received both financial and intangible benefits. Accordingly, Martoma's sufficiency challenge has no merit.

36. "A defendant challenging the sufficiency of the evidence bears a heavy burden." *United States* v. *Kozeny*, 667 F.3d 122, 139 (2d Cir. 2011). A jury verdict must be upheld if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States* v. *Persico*, 645 F.3d 85, 105 (2d Cir. 2011) (internal quotation marks and citation omitted) (emphasis in original). A "court may enter a judgment of acquittal only if the evidence that the defendant committed the crime alleged is nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt." *United States* v. *Espaillet*, 380 F.3d 713, 718 (2d Cir. 2004) (internal quotation marks and citation omitted). In considering the sufficiency of the evidence supporting a guilty verdict, the evidence must be viewed in the light most favorable to the Government. *See United States* v. *Temple*, 447 F.3d 130, 136-37 (2d Cir. 2006).

37. Contrary to Martoma's claim, abundant evidence established that Dr. Gilman received both financial benefits as well as friendship in exchange for his tips to Martoma.[2] Specifically, the evidence showed that Dr. Gilman had paid consultations with Martoma—during which he passed on non-public information—on over 40 separate occasions. Further, the

[2] Following the parties' summations, in a jury instruction that Martoma does not challenge on this appeal, Judge Gardephe charged that the Government had to prove that "Dr. Gilman or Dr. Ross received or anticipated receiving some personal benefit, direct or indirect, from disclosing the material, non-public information at issue," and that the "benefit may, but need not be, financial or tangible in nature; it could include obtaining some future advantage, developing or maintaining a business contact or a friendship, or enhancing the tipper's reputation." (Tr. 1391).

evidence showed that Dr. Gilman passed on these tips to develop and maintain his friendship with Martoma. Indeed, Dr. Gilman testified that he had developed a real friendship with Martoma (Tr. 1235-40, 1487-91, 1893; GX 235), that Martoma told him that he "wanted to be friends" (Tr. 1236), that they met to have coffee and chat (Tr. 1237, 1893), that Martoma worried when he could not reach Dr. Gilman by phone (Tr. 1239-1240), that Martoma reminded Dr. Gilman of his inquisitive and bright son whom he had lost to suicide (Tr. 1893), and that Martoma talked with Gilman "about his family, about his wife, about having children in fairly rapid succession, and told [Gilman] about his parents emigrating from India" (Tr. 1237-1238) (transcript excerpts above attached as Exhibit B). This evidence of the fees and the friendship Dr. Gilman received provided a sound basis for the jury to conclude that Dr. Gilman received the necessary benefit.

38. In challenging the sufficiency of the evidence, Martoma asserts that Dr. Gilman did not receive financial payments in connection with his provision of inside information to Martoma, where Dr. Gilman did not submit for payment invoices related to his provision of inside information to Martoma on two occasions: July 17, 2008 and July 19, 2008.[3] (Br. 19). In making this argument, however, Martoma ignores the numerous prior consultations between Martoma and Gilman—for which Gilman received payment—where Gilman provided non-public information to Martoma, which allowed Martoma and SAC to build their massive positions in Elan and Wyeth without fear that the public disclosure of a safety-event would cause the value of the stocks to plummet before they could get out of the positions. Martoma paid for these frequent consultations because it allowed him to develop a corrupt relationship with a

[3]Gilman testified that he did not seek payment from GLG for his phone consultation with Martoma on July 17, 2008, or his in-person meeting with Martoma on July 19, 2008, during which he shared the secret efficacy results, because to do so would have been "tantamount to confessing that I was . . . giving him inside information." (Tr. 118).

senior clinician on the Elan trial such that if and when the clinician learned the final results he would share them with Martoma, which is precisely what occurred.

39. Martoma also argues that the evidence of his friendship with Gilman does not establish the necessary benefit because "[n]o Court of Appeals has found a 'benefit' based on a relationship as casual as the one alleged here." (Br. 20). Contrary to this contention, it is juries, and not Courts of Appeals, that make such findings, and this Court should defer to the jury's finding here, because the evidence of the necessary benefit was not "nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt." *United States* v. *Espaillet*, 380 F.3d at 718. In view of this standard, which Martoma ignores entirely, Dr. Gilman's extensive testimony regarding his friendship with Martoma, cited above, provided the jury with an ample basis—and certainly more than a meager one—to find that the friendship between Dr. Gilman and Martoma was more than the "casual" one Martoma depicts (Br. 20), and was more than sufficient to establish the necessary element.

40. Martoma also states, in a footnote, that "[t]his Court is currently considering the scope of the personal benefit requirement in *United States* v. *Newman*, No. 13-1837," and notes that "[t]his Court granted bail to the defendants in that case." (Br. 26). This case, however, is nothing like *Newman*. In that case, the district court did *not* instruct the jury that the Government was required to prove the defendants knew an insider disclosed information for a personal benefit, and the defendants are contending on appeal that such an instruction should have been provided. By contrast, in this case, Judge Gardephe provided the instruction that was not provided in *Newman* (Tr. 1391), an instruction not objected to by Martoma, and the challenge raised by Martoma is simply to the sufficiency of the evidence. Further, that sufficiency

challenge has no merit, and does not amount to a substantial legal or factual issue as necessary to warrant bail pending appeal.

CONCLUSION

41. For the foregoing reasons, the Government respectfully requests that the Court deny Martoma's motion for bail pending appeal.

Dated: November 7, 2014
New York, New York

Respectfully submitted,

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Exhibit A

as well as a variety of the materials, the pleadings in this case which were provided by the attorneys.
Q. Aside from the attorneys, where else did you get the materials that you reviewed?
A. From public sources, so you can -- stock price data can come from a variety of databases. I used the CRISP; it's the Center for Research on Security Prices. There are a number of databases where you can go to get analysts' reports, number of databases to get news stories; and so all of these things are generally available data sources, publicly available databases that you can access this information.
MR. BRACERAS: Your Honor, at this time I'd like to offer Defense Exhibit 20-A. And I understand there is no objection to this.
MR. INGOGLIA: That's right, no objection.
THE COURT: Defense Exhibit 20-A is received.
(Defendant's Exhibit 20-A received in evidence)
Q. Can we publish this? Professor Gompers, I would just like to show you Defense Exhibit 20-A just to indicate that this is an email from Cowen Equity Research forwarding a Cowen Research note to Mr. Martoma on July 21, 2008. Do you see that, Professor Gompers?
A. I do.
Q. I would like now to turn to Defense Exhibit 1144 which has already been admitted. I believe it's the next page. 1144-A,

I'm sorry, Mr. McLeod.
I am showing you what's already been admitted as Defense Exhibit 1143-A, Professor Gompers. Are you familiar with what type of document this is?
A. I am. It's an investment analyst report.
Q. Who prepared this particular report?
A. Cowen & Co.. It's an investment house, and they've prepared -- like many investment houses and independent research houses will publish reports on public companies and provide analysis of those companies.
Q. What's the purpose of an analyst report?
A. It's to provide information to their clients and their investors. So, it's one way that information is disseminated and sort of -- sort of -- sort of given to their clients. So it's a collection of information, and the investment analyst will do their own sort of analysis and data, data work and then come up with some investment theme about whether or not they think the stock is overvalued, undervalued, a good buy, whether you should sell it. So they make recommendations to their clients based on their analysis of the information that's out in the market.
Q. This isn't something that sort of the mom-and-pop investor would normally review, I take it?
A. No. Typically, it's given to the -- to their important clients. So, large institutions. If you are an individual

with large accounts at a particular investment house, you will often get these reports as well, but it's typically not disseminated widely to, say, you know, typical small investors.
Q. But their investment advisors would have access to this?
A. That is correct.
Q. Let me turn you to page 2 of this report. I would like to highlight the paragraph beginning "based on our discounted cash flow analysis."
Could you read that paragraph, please?
A. Sure. Based on our discounted cash flow valuation analysis, we estimate that Elan's current $16 billion valuation implies approximately $7 to 8 billion in bapi sales by 2015. While $7 to 8 billion ultimately may prove to be conservative bapi sales -- it may be a conservative bapi sales estimate, we have only seen top-line Phase II results and Phase III data are more than two years away, so a risk adjustment is warranted. Therefore, we project modest near-term upside to current Elan share price and rate Elan shares neutral."
Q. So it begins "based on our discounted cash flow analysis." What is a discounted cash flow analysis?
A. So, one of the fundamental concepts of finance is the idea that companies and shares of stock are not like a piece of art that you put on your wall. You buy them because they pay you cash in the future. You get your dividends and share price appreciation. And a core concept of finance over the last 50

years has been that we can assess the value of any share of any company by doing a discounted cash flow analysis where we project out the revenues and cash flows from the company, and then we have to adjust for two things: The fact that cash today is worth more than cash tomorrow, and the fact that safer cash is worse more than riskier cash. So that's where discounting comes in. So we project these cash flows and at a discount rate appropriate to the timing and riskiness, we bring that value back to today.
Q. Let me turn you to page 11 of this report.
Does this reflect a discounted cash flow analysis?
A. It does.
Q. Could you possibly explain this in as simple terms as a lawyer could understand?
A. Sure. So, in the upper left here is the set of a -- a summation that the Cowen analyst is making. And so what this says are a couple of things. First, the Cowen analyst is going to make projections for Elan revenues and will -- I will get to the revenues in a second. But beyond 2015, he is assuming that revenues continue to grow for the next five years at nine percent. He also estimates that an appropriate discount rate for the riskiness of Elan is ten percent. So he is going to discount those future years back to 2008 at a discount rate of ten percent.
Then he has some other things about the current share

price and the number of shares outstanding because eventually he will have to divide the total value of Elan by the 473 million shares outstanding.
Q. Could you explain the area there where it talks about the bapineuzumab or bapi sales projections?
A. Sure. So, the first line you see here on the projections are just what the Cowen analyst has projected for revenue for bapi over the next 12 years through 2020. What you can see is he assumes or projects that bapi will be introduced in the market in 2011 with a billion dollars of sales and then will grow by 2015 to 7 and a half billion of sales and then ultimately from there grow at that nine percent number that we talked about earlier in the assumptions.
If you go to the next line, he makes the adjustment that because this is a joint project with Wyeth, that 50 percent of those revenues flow down to Elan, and so basically that next line is just half of the line above it.
Q. How do these sales projections fit into the discounted cash flow analysis?
A. Well, they're the starting point. What you need to do from these revenues are take out all the expenses associated with the running of a pharmaceutical company, the running of a biotechnology company to get down to what the earnings and cash flow are.
Q. Are the projected costs or expenses listed in this sheet

somewhere?
A. Sure. It's sort of small, but if you go down, what he does below these revenue numbers is project out some other revenues for Elan. But then under that middle box where he has total revenues, you see a line which is labeled cost of goods. And all that is is how much does it take to make your drugs.
And so from the revenue number, you subtract off that cost of goods to get a gross profit number. So what is the contribution margin, how much money are you making from selling the drugs.
But from that, you have to take off some additional expenses because you have overhead. When you run a business, you have office staff, you have sales and marketing people out there trying to get doctors and patients to use your drug. And so that next line here is what's called SG, and it just stands for sales general and administrative, and that's your overhead.
So, the overhead to run a business are all included there, and so he projects out what the overhead is going to be for the next 12 years as well.
Q. How do these expenses fit into the discounted cash flow analysis?
A. These expenses all have to be subtracted from that gross profit number, so it's revenues minus all of your expenses, not just what it costs you to make the drug but everything else necessary to run a business to ultimately get down to your

income and your cash flow numbers.
Q. I think you mentioned the discount rate. But what discount rate did he use?
A. He assumed a discount rate of ten percent.
Q. Is that a reasonable discount rate?
A. It's a reasonable discount rate. It may be a little low given that this is a young company not making a lot of money. It's in a high-risk development industry, but ten percent is at least a reasonable starting point for a discount rate.
Q. How does that discount rate fit into the discounted cash flow analysis?
A. So, what you do is on the very bottom here after you take out all the expenses, you get to this bottom line number which is free cash flow.
Q. Maybe we could highlight that, Mr. McLeod?
A. So what you do is take that ten percent and discount every one of these years back to the present, or, in this case, 2008. And if you actually do that, you go -- if you go to the output table at the top, what you will find is that all of those numbers lead to a value of $16 and a half billion. So those cash flows, his cash flow projections discounted at ten percent give you that value.
Q. And that $16.5 billion, that would be the value, I take it, of Elan?
A. Exactly. The total value of Elan. And if you convert it

on a per share basis, it's roughly $35 a share, $34.93.
Q. If we could turn back to page 2 of this report. Just highlight that same paragraph we were looking at.
So, in the first sentence where it says: "We estimate that Elan's current $16 billion plus valuation," is that where they got the 16 billion valuation?
A. Yes. So, the 16 billion here ties back to the Exhibit on page 11 of the report.
Q. If you read into the -- well, if you follow that sentence, it says, "implies approximately $7 to $8 billion plus in bapineuzumab sales by 2015." Why is that? Why does the 16 billion valuation imply $7 to $8 billion in bapineuzumab sales in 2015?
A. So, when you do a discounted cash flow, you don't discount the sort of best-case or worst-case scenario. You discount what you expect to happen, what's going to happen? And so what this means is you have to be nearly a hundred percent certain that you're going to get $7 to $8 billion of bapi sales in order to back into that $16 billion. So there is no probability adjustment that you don't hit that. It's sort of that's what you're expecting to hit.
Q. OK. And how does $7 to $8 billion of sales compare with other drugs in the market at that time?
A. It would be an absolute blockbuster. So I -- if it was between 7 and 8 billion, it would be the second best-selling

drug in the world. Lipitor would be number one at 13 and a half billion. But if it were to achieve 7 to 8 billion, it would be the second best-selling drug in the world.
Q. If you look lower down that same paragraph, Mr. McLeod, it says "And Phase III data are more than two years away so a risk adjustment is warranted."
What does that mean, and why is a risk adjustment warranted?
A. Well, because it's not certain that bapi would be approved. So, there are multiple stages a drug guess through. If you look at drugs that get to Phase III, only about 64 percent end up being approved. So, what the analyst is saying here is that, you know, really you need to make some adjustment to this because there is at least some reasonable probability that bapi isn't going to be approved and successful on the market.
Q. Thank you Professor Gompers.
If we just highlight the last sentence of this page, starting with the "with bapineuzumab."
Could you read that beginning with "with"?
A. "With bapi Phase III data two plus years away following the Phase II data presentation, we believe Elan shares have little near-term upside potential regardless of the strength of the data presentation."
Q. And the date of this report is July 21, 2008; is that right?

A. That is correct.
Q. You see that at the bottom of the page there?
A. Yes.
Q. Why would Elan shares of little near-term upside potential regardless of the strength of the data presentation?
MR. INGOGLIA: Objection.
THE COURT: What are your grounds?
MR. INGOGLIA: He's explaining the terms in the analysis.
THE COURT: You are going to have to lay a foundation for him to testify on this point.
Q. Well, did you review this analyst report, Professor Gompers?
A. I did.
Q. Do you understand that this analysis is based on the discounted cash flow analysis that you were just describing?
A. I do.
Q. Did you in reviewing this understand the analysis that the Cowen analysts did on that discounted cash flow analysis?
A. Yes.
Q. Do you understand what Cowen is basing this explanation here on?
A. I do.
THE COURT: So the question has to be what is his understanding of why the Cowen analyst believes that there is

little near-term upside potential to the shares.
MR. BRACERAS: Thank you, your Honor. I don't think I could ask it any better.
A. It's my understanding that through this analysis, one of the things that the analyst says throughout the report is that baked into the price is this expectation of blockbuster status already, and, you know, no matter what happens with the next presentation of Phase II data, the stock price can't go up because you're already expecting it to be a $7 to $8 billion drug and you're not going to get any new information about it for at least two years until the Phase III results come in.
Q. Just a couple more questions on this report, Professor. If we turn to page 9 of the report, and highlight the section Elan shares.
If you could just read the header of that section, Professor Gompers.
A. "Elan shares already reflect $7 to $8 billion sales potential."
Q. If you could read the last sentence beginning with "our valuation"?
A. "Our valuation sensitivity analysis matrix (see results below), which is based on an abbreviated discounted cash flow analysis through 2015 using various bapi sales projections and discount rates (holding all other estimates constant), yields upside to the current Elan share price greater than $35 only if

we assume that bapi sales reach $10 to $12 billion in 2015."
Q. What is your understanding of a sensitivity analysis matrix?
A. A sensitivity analysis just shows how the value of something changes if we change a set of assumptions. In this case -- I can't even see it.
Q. If we could, Mr. McLeod, highlight the box on the next page, the graph which is the sensitivity analysis? Thank you.
A. So, in this case what the Cowen analyst is doing is across the horizontal axis, if you go from left to right, he is changing his assumption about what sales in 2015 for bapi would look like. And on the vertical axis starting at 8 going down to 12, he's varying his assumption about the discount rate. And each of these numbers represents for that pair of assumptions what the implied share price of Elan is.
Q. That's implied share price based on the presumed number of sales of bapineuzumab?
A. That's correct. It's the discounted cash flow analysis. So a discounted cash flow analysis with this level of sales in 2015 and this discount rate gives -- gives you this for a share price.
Q. What in your opinion is a reasonable discount rate?
A. Again, I think as a starting point, ten percent. I think one might argue higher, but if we start at ten percent, it is a reasonable place to start.

Q. According to this chart what revenues would be necessary to support Elan's, say, $35 a share price at a reasonable discount rate?
A. It looks to be between $10 and $11 billion of sales in 2015. So, if sales of bapi in 2015 are between $10 and $11 billion and the discount rate is ten percent, it implies that the value per share should be about $35.
Q. Thank you, Professor.
We could take that down, Mr. McLeod.
Let me now show you -- we will go over one other analyst's report, Professor Gompers. Let me show you what's already been admitted into evidence as Defense Exhibit 9-A. Professor Gompers, I'm just showing you an email from a Tim Jandovitz to Mr. Martoma dated July 11, 2008 forwarding an Elan analyst report. Do you see that?
A. I do.
Q. I should ask you, you've never met Mr. Martoma, have you?
A. I haven't. He was on one call that I was on, but I haven't met him in person.
Q. Now, if we could go to the analyst report that was forwarded to Mr. Martoma here, which is Defense Exhibit 9. What do you recognize Defense Exhibit 9 to be, Professor Gompers?
A. It's another analyst's report. This one written by Brean Murray, another investment house, so it's similar to the Cowen

report. It was written by an investment analyst and sent out to their clients.
Q. And maybe you just said it, but what is Brean Murray?
A. It's an investment house. They publish research in -- on public companies.
Q. If we could turn to page 4 of Exhibit 9. Professor Gompers, what is a development pipeline?
A. So, as it would relate to a biotech or pharma company, a development pipeline is just a listing of the potential drugs that a biotech or pharmaceutical company is developing and where those drugs are in the process of moving from finding them to ultimately having drugs which you're selling on the market.
Q. How does a development pipeline relate to the value of a biotech or pharmaceutical company?
A. So, a biotech or pharma company can only be worth something if it ultimately develops real drugs that treat real diseases. So this gives a sense of how soon and where and how risky some of their drugs are. So, clearly, the further you are up to the left, the less likely it is that you are ultimately going to be approved and have a real drug that you can sell on the market. So this gives a sense of how soon Elan may be able to generate revenue from a variety of projects it's developing.
Q. So maybe we could just go over this development pipeline relatively quickly if we could. Professor, the first column, I

think it says discovery. Do you understand what that is?
A. Yes. That's where the company identifies compounds or targets that maybe useful for treating particular diseases. So no research has been done other than identifying the compounds.
Q. Then the next column, I think, says preclinical. What does that indicate?
A. That's testing before you get into humans. So typically it's done on animals. So you'll have some animal models where you try to see whether or not the drug might be effective to treat the particular disease.
Q. And Phase I?
A. Well, Phase I is where you start actually giving the drug to people. In Phase I, you actually give the drug to healthy people who aren't sick, and you test whether or not the drug is safe, and you start getting some sense of what dosages might look like.
Q. Had bapineuzumab passed this stage?
A. Yes, it had.
Q. The next phase, the next column indicates Phase II?
A. So, Phase II is when you first start treating patients who have the disease, and this is small numbers of patients. You draw small numbers of patients and you see whether or not the drug has a potential effect on people who are really sick.
Q. Do you have an understanding as to how many drugs in Phase II ultimately get FDA approval?

MR. INGOGLIA: Objection.
THE COURT: I don't think you have a foundation for this yet, but you can try to build one.
MR. BRACERAS: Thank you, your Honor.
Q. Professor Gompers, have you done research on pharmaceutical companies?
A. Both pharmaceutical and biotechnology companies.
Q. As part of that research, is the drug pipeline important?
A. Absolutely. You know, a number of the cases I've developed for my course on equity finance dealt specifically with valuing biotech companies, and you certainly have to look at the drugs in the pipeline and where they are in their stage of development in order to get some sense of what revenues and cash flows might look like.
Q. You just touched on this, but why is the developmental stage of a drug important to the value or stock price of a company?
A. Well, the earlier the stage, the less likely it is that you get to final approval and marketing because at each stage drugs fail. Drugs fail in Phase I. Drugs fail in Phase II. Drugs fail in Phase III.
So, there's failure rates all along that you have to factor in. So, it's just part of what you do. Because when you go back to the valuation analysis, you can't assume a hundred percent. You need to adjust for the fact that there

are these hurdles that you need to get over.
Q. Have you written papers on these issues?
A. I have.
Q. In the course of your research in preparing papers and teaching, have you become familiar with the rates of approval through the FDA process?
A. I have.
Q. Have you also become familiar with the, shall we say, challenges of marketing a drug even post approval?
A. Yes.
MR. INGOGLIA: Your Honor, objection as to scope. I think we're beyond the scope of your order. I thought we were interpreting these particular analysts' report.
THE COURT: I'll talk to counsel at the bench.
(Continued on next page)

(At the side bar)
THE COURT: I'm a little concerned about having him testify as an expert on the FDA approval process. It seems to me to where we are going.
I'll hear you, Mr. Braceras.
MR. BRACERAS: Yes, your Honor. I think consistent with the Court's prior rulings, and I have a cite to discussion we had at side bar a few days ago, that you're allowing a discussion of the analysts' reports that are already into evidence and, of course, you can see how complicated these are. You can see why it would be necessary. So we really aren't doing that much with this.
Maybe the reason we went broader right now is because of the objection to foundation. Professor Gompers is going to testify just in valuing companies he, of course, realizes the statistics of the difficulty in getting FDA approval, and then it's going to come back to explaining that chart. And I think your Honor has it up on the stand, but the development pipeline is part of the analyst report that's already in evidence, and then we're going to bring it to the next page which discusses the valuation and why that's relevant to the valuation.
THE COURT: So presumably he is going say that a lot of drugs that are in Phase II ultimately don't get approved.
MR. INGOGLIA: I think he's probably already said that.

THE COURT: Yes, and given the additional questions that Mr. Braceras has brought out, I think there is probably an adequate basis to conclude that he knows what the rates of approval are.
MR. INGOGLIA: I think that's probably right, Judge. I think that our concern is this particular analyst doesn't seem to be focused on these issues that we're bringing out through his testimony now, so we are sort of mixing what is his expert testimony and the FDA process and the approval process to give more insight or to give it -- to make additional points on the report itself. If you direct the question to the report itself, obviously I'm not going to object. If you're interpreting a term or percentage on a report --
MR. BRACERAS: I mean, I had one more question like that. It was just in order to get to approved status, it's, you know, here is where bapi is, and I'm just going to ask what is the percentage. This is the known percentage of the approved. So I have one more question like that.
THE COURT: So, you're going to ask him of the drugs that reach Phase III, how many ultimately get approved?
MR. BRACERAS: Exactly. I think I already wrote that in my outline.
MR. INGOGLIA: That's fine. If that's it, I'll withdraw my objection.
MR. BRACERAS: I'll ask that question about Phase II,

then the other page, then I'll move to the next page where it's incorporated in the next page paragraph.
(Continued on next page)

(In open court)
THE COURT: You may proceed, Mr. Braceras.
MR. BRACERAS: Thank you, your Honor. Just a moment, your Honor.
Q. While we're waiting for that, Professor Gompers, do you have an understanding how many drugs like bapi in Phase II ultimately received FDA approval?
A. I do. It's about 36 percent.
Q. Now, we are trying to pull up the Exhibit 9 again. The next column in Exhibit 9 in the development pipeline was Phase III. What is Phase III, professor?
A. Phase III is after you move from small samples of sick patients, you actually start testing it in a large sample of sick patients to try and get statistical significance to try and see whether or not there is a real effect, and so Phase III is when you start doing hundreds and hundreds and sometimes even thousands of patients in drug trials.
Q. Do you have an understanding as to how many drugs that enter Phase III ultimately receive FDA approval?
A. I am. And that number is about 64 percent. So, conditional or once you get into Phase III, you have about a 64 percent chance of ultimately getting approved.
Q. The next column says filed. What does that mean?
A. Filed just means you take all of your research results and you're filing forms and you give it to the FDA, and then the

FDA undertakes a review and considers whether or not they ultimately want to approve your drug.
Q. Next column approved?
A. That's when you hopefully get approved. Does your drug and all the data warrant a vote of approval from the FDA.
Q. Are there any other steps in the drug development process?
A. Well, in some sense, it may only be the beginning because then you have to do all the business stuff. You have to manufacture the drug. You have to market it. You have to continue to try and make this, you know, this promising compound now a real drug, a real business.
Q. Let's turn to the next page, page 5 -- I'm sorry, page 3 of this report. No, it is page 5. I'm sorry. This page is highlighted valuation. What does this page reflect, professor?
A. This page is just the analyst's valuation approach to how the valuation of Elan was undertaken.
Q. Could you explain the first paragraph and what the discount rate that the Brean Murray analyst is using?
A. So the Brean Murray analyst is doing a slightly different approach. They are using a discounted valuation approach. His discount rate -- Cowen used ten percent. This analyst is using 20 percent.
Q. What does that tell you of the ten percent versus 20 percent?
A. That it's potentially riskier. So, the higher the discount

rate, the riskier the company or the riskier you believe the company to be.
Q. So the Brean Murray report is telling you, or at least your understanding is, the Brean Murray analyst believes this is a riskier proposition than the Cowen report?
A. Absolutely. So, 20 percent -- the higher your discount rate, the lower your value. So, this is at least telling you that the analyst believes that it's riskier. This analyst, the Brean Murray analyst, thinks it's riskier than the Cowen analyst.
Q. Mr. McLeod, if we can highlight the table in the bottom of this. If you could just try to point us in the right direction here, Professor Gompers, as to what -- to show us on this table what the effect of moving from a ten percent discount rate to a 20 percent discount rate would be?
A. So, as you can sort of see, if you just take his two boxes, he applies a certain PE multiple and a certain revenue multiple and his ultimate conclusion is that Elan should only be worth $17 or $18 a share. If you actually used in his analysis a ten percent discount rate, you'd get $24 a share in the PE multiple case, and you'd get $26 a share in the revenue multiple case.
Q. You say PE multiple. What is that?
A. So, it's just a -- it's a useful yardstick that investment professionals often use to value companies where it's a multiple. So they'll look at what the earnings are or what

projected earnings are and multiply that earnings by this number. In this case, he chooses 30 for earnings, 30 times multiple.
Q. Mr. McLeod, if we could go up to the paragraph that begins "applying a revenue multiple."
Professor Gompers, if you could just read the first two sentences of that down to $18 per share?
A. Sure. "Applying a revenue multiple of eight times and an earnings multiple of 30 times to our 2013 revenue and EPS estimates of $2.9 billion and 1.19 billion respectively and a discount rate of 20 percent to reflect the development and commercialization risk associated with Elan's programs outside of bapi, we arrive at a fair value of about $18 per share."
Q. I think it read "fair market value"?
A. Excuse me, fair market value.
Q. What does fair market value mean as used in this report?
A. It means the value based on his model of the future revenue and earnings of Elan.
Q. Can you explain how the Brean Murray analyst here arrived at a fair market valuation in this report?
A. So, the Brean Murray analyst takes his estimate of sales and earnings in 2013. He then takes his PE multiple of 30 or his price to sales multiple of eight, multiplies his earnings and revenue numbers by those, gets a value for Elan in 2013, and then uses his 20 percent to discount it back to July of

2008.
Q. And what is that valuation?
A. It's between $17 and $18 a share.
Q. Does competition have any impact on fair market value?
A. Absolutely.
Q. Let me ask you to read the paragraph that begins "even if bap is approved."
A. "Even if bapi is approved, Eli Lilly has a similar anti-beta amyloid antibody program in Phase III. Pfizer has a small molecule drug in Phase II that is intended to reduce beta amyloid burden. And Genentech has an anti-beta amyloid antibody program in preclinical development.
(Continued on next page)

Q. And if you could read next sentence as well?
A. "Therefore, Elan and Wyeth would likely face near-term competition because we would expect these competitors to aggressively move their programs forward if bapi is successful."
Q. How does near-term competition impact fair market value?
A. It's an additional risk. So if you assume that bapi is going to have 7 or 10 or 12 billion of sales in 2015, the probability that you can achieve that is reduced if direct competitors come in. And if direct competitors come in quickly, your ability to gain market share is dramatically hampered.
Q. So just a couple of more questions on this report.
If you turn to page 12, Mr. McLeod.
And if you could read the bottom line which carries over to the next page?
A. Starting at where? "Therefore"?
Q. Starting at "Bottom line."
A. OK. "Bottom line, our EPS estimates for 2008, 2009, 2010, '11, '12 and '13 are negative 51 cents, negative 28 cents, 7 cents, 54 cents, 81 cents, $1.19, respectively. Despite revenue and expense estimates that we view as generous, we believe that the existing business lines, even if they can continue the strong growth we project, are far from sufficient to support Elan's market value. Therefore, given our projected

clinical failures for bapi, we view Elan's market value as inflated."
Q. What does it mean for the market value to be inflated?
A. It means that the value, the fair market value, based on the revenue and cash flows, is below where the current market price is.
MR. BRACERAS: Thank you. We could take that down, Mr. McLeod.
Q. Are there any instances where a company's stock price does not accurately reflect its value, Professor?
A. Certainly. Over the last 15 years, one area of research which has exploded is the area of behavioral finance. And I think what most common people knew was that stock markets can be crazy at times has gained credibility in academic circles. So if you surveyed financial economists today, most financial economists would agree that prices can diverge from fundamental value.
Q. Are you aware of samples of an inefficient market?
MR. INGOGLIA: Objection, Judge. We had a ruling on this.
THE COURT: Yes.
MR. BRACERAS: OK. Your Honor, we can move on.
THE COURT: All right.
BY MR. BRACERAS:
Q. Professor Gompers, have you had an opportunity to review

SAC's trading in Elan and Wyeth in June and July 2008?
A. I have.
Q. What exactly did you review?
A. I looked at what their holdings were over that period of time in both Wyeth and Elan stock as well as their exposure to Elan stock through what's called an equity swap. So look at how their profit and loss would change with changes in the value of Elan and Wyeth.
Q. I show you, Professor, what's been marked as Defense Exhibit 1403, for identification.
What is this, Professor Gompers?
A. This --
Q. Just say -- did you prepare this?
A. Yes. It was prepared under my direction, yes.
Q. And it was prepared based on trading data that you received?
A. That is correct.
MR. BRACERAS: Your Honor, the defense offers Exhibit 1403.
MR. INGOGLIA: No objection, Judge.
THE COURT: Defense Exhibit 1403 is received.
(Defendant's Exhibit 1403 received in evidence)
BY MR. BRACERAS:
Q. OK. Now, you can explain this now, Professor.
A. OK. So SAC held positions in Wyeth and Elan -- well,

Exhibit B

A. I'm sorry. With the Gerson Lehrman Group.
Q. And did you participate in that telephone conversation?
A. I did.
Q. Consultation?
A. I did.
Q. Were you paid?
A. Yes.
Q. So if January 2006 was your first consultation with Mr. Martoma, can you tell us when the consultations with Mr. Martoma stopped through the Gerson Lehrman Group?
A. They stopped in 2008, on January 30th.
Q. January 30th, 2008 they stopped?
A. Yes.
Q. When did they --
A. Excuse me. July 30th. I'm sorry, I misspoke. January 30th.
Q. Did you ever speak to Mr. Martoma outside of the Gerson Lehrman Group --
A. Yes, I did.
Q. Did you only speak to Mr. Martoma in phone consultations or did you ever see him in person?
A. I spoke with him in person on several occasions.
Q. Do you recall the first time you met Mr. Martoma in person?
A. I do.
Q. When was that, approximately?

A. That was approximately October of 2006.
Q. Where did you meet him?
A. At the -- at an office in New York City.
Q. Did you know whose office it was when you met him there?
A. It was an office of SAC Capital. He was at the division called CR Intrinsic, which is a division of SAC Capital.
Q. And how did it come to be that you met him at the office there?
A. I was visiting New York City for another reason, and the Gerson Lehrman Group took advantage of any of their consultants who happened to be in New York City to arrange consultations with any of their clients who wished to have such consultations. And so they walked us around for among the class who expressed such interest. And he expressed interest and I went to see him.
Q. And was it just you and him, or was anyone else at that meeting?
A. It was just the two of us.
Q. Was anyone from Gerson Lehrman Group there at all?
A. No. Not with us -- a person from the Gerson Lehrman Group walked me to the office.
Q. And did that person accompany you to the meeting with Mr. Martoma?
A. Would you please say that again?
Q. Did that person from the Gerson Lehrman Group also accompany you to the meeting with Mr. Martoma?

A. Just escorted me to the meeting and then departed.
Q. And what do you recall about the meeting with Mr. Martoma?
A. Well, I remember that he had lunch prepared, which was most unusual on those visits to clients of the Gerson Lehrman Group. He had an array of sandwiches prepared, which I thought was a very thoughtful gesture.

And I remember what a pleasant individual he was. He was very, very friendly, very nice, very cordial, complimentary about the previous consultations we had had on the telephone.

And we sat down and he asked me numerous questions then, very good questions. I thought he was a very bright individual. He asked me about several medications focused mostly upon Alzheimer's disease. There were numerous drugs in clinical trials at the time.
Q. What gave you the impression that he was a bright individual?
A. Well, every time I told him about a clinical trial, he seemed to know a good deal about it. And as I described in more and more depth about each trial, he seemed to ask a perceptive question about that point and wanted to know more. So the more I told him about each of the trials, the more he wanted to know.

He was just a very -- very interested or persistent. I wish I had students like that back in Ann Arbor. I thought

he was really impressive. I also thought he was very pleasant, complimentary also.
Q. Complimentary about what?
A. About me, about my style of teaching.
Q. Anything specific about your style of teaching?
A. He thought I was very clear in explaining things.
Q. Did you form any impression in the lunch meeting you had, or soon thereafter, with respect to what level of understanding he appeared to have in science?
A. He seemed to understand the science quite well, as far as I could tell. Of course, it was only an hour meeting but it looked as if he was getting -- as if he had a good background. I didn't inquire about that, but he seemed to have a good background.
Q. How many people -- well, sorry.

I think you testified before that you probably spoke to several hundred clients through GLG, through the Gerson Lehrman Group?
A. By that time I have no idea how many I had spoken with, but I think he was one of the outstanding people that I consulted with. He's among the top ten people with respect to his inquisitiveness.
Q. In the whole time while you were serving as a consultant to the Gerson Lehrman Group, do you recall who you consulted with the most, or do you have an impression of it, anyway?

A. I think he was the person I consulted with the most, yes.
Q. Did you enjoy consulting with him more than other hedge fund clients?
A. I enjoyed other consultations as well, but I enjoyed speaking with him, yes.
Q. At about the same level as other hedge funds' clients?
MR. STRASSBERG: Objection, your Honor.
THE COURT: Sustained.
Q. Was there anything that stood out in your consultations with Mr. Martoma?
A. Well, yes. He wanted, as I got -- as I had more and more interactions with him, he said he wanted to be friends. He seemed to want to be closer than I thought a client should be to a consultant. He said that to me several times. And initially I resisted that overture.
Q. Do you know what he -- did you know what he did for a living while you were consulting with him?
A. Yes, I did.
Q. What did he do?
A. Well, he said, he told me he was a fund manager for his company.
(Continued on next page)

Q. Did you understand at that time what the role of a fund manager for his company was?
A. Well, I'm an academic person. I don't know much about finance, frankly, but, yes, I understand these people buy and sell securities.
Q. What did you understand securities to mean?
A. Security means stocks and bonds.
Q. Did you have any understanding about the reason he was consulting with you?
A. Yes, I assume that it was to understand more about the pharmaceuticals he was talking to me about so that he could make decisions about purchasing or selling.
Q. You testified a moment ago that you believed he wanted to become your friend; is that right?
A. That's what he told me.
Q. Well, did your relationship change at all from a purely business relationship?
A. Well, he wanted to meet at national meetings; for example, the American Academy of Neurology. I think that was the main one. I don't remember whether he ever went to the American Neurological Association meeting. Those were the two main ones where there were clinical topics discussed. But he did want to meet there, have a cup of coffee and chat, and we did. I did succumbed to that request. He told me about his family, about his wife, about having children in fairly rapid succession, and

told me about his parents emigrating from India.
Q. What did you talk to him about in your own life?
A. Not much.
Q. Let me show you what's been marked for identification as Government Exhibit 207, please. If you could take a look at that and let us know if you recognize it?
A. Yes.
Q. What is it generally?
A. It is an email from me to Mr. Martoma's secretary.
MR. DEVLIN-BROWN: The government offers 207.
MR. STRASSBERG: No objection, your Honor.
THE COURT: Government Exhibit 207 is received.
(Government's Exhibit 207 received in evidence)
MR. DEVLIN-BROWN: May we publish it, your Honor?
THE COURT: Yes.
Q. If we could start at the bottom of the page, Ms. Hernandez, with the bottom email.
Dr. Gilman, this appears to be from someone name Stephanie Reisenman. Do you know who she is?
A. She was Mr. Martoma's secretary at the time.
Q. The email reads: "I am writing to confirm the Gerson Lehrman Group consultation that you have scheduled with Mathew Martoma for August 22 at 1:00 p.m. eastern. The topic of the call is an overview of novel therapies for Parkinson's disease."

My first question, Dr. Gilman, is did you consult with him on diseases other than Alzheimer's disease?
A. Oh, yes.
Q. If we could zoom out now, please, and look at the response at the top of the email.
Now, my first question, actually, is the email below it looked like it was from Stephanie Reisenman and your response is to Stephanie Zalazny. Is that the same person?
A. I think so, yes.
Q. And you write: "Thanks for this. The call is on my calendar, and I promise that I will not re-duplicate my behavior when I was in Istanbul and completely overlooked the commitment. I want to commend you again on your persistence in finding me then. I still have a red face."
What are you referring to there about not re-duplicating your behavior when you were in Istanbul?
A. Mr. Martoma had set up a telephone consultation for a time when I was abroad attending a movement sort of meeting. I had gone to Istanbul with my wife for a week. It's a fascinating city where we'd never been before. She stayed -- she seldom travels with me because of her work. She stayed a week and then departed, and I was left to attend my meeting. I totally forgot the meeting with Mr. Martoma, and he called me persistently in the hotel. They initially denied that I was there. He finally located me in a -- in an area of the hotel,

kind of a lobby-type area where I was located reading, and the people there told me I had a call. It was Mr. Martoma reminding me we'd had a consultation. I was -- he had been on the telephone for the better part of an hour, he said, trying to find me and he said he was worried about me. I was in a foreign country, and he couldn't find me, I was reading. It was touching that he tried so hard to find me, he was worried about me when I forgot about the consultation. I found it very touching.

Q. You can take that off the screen, Ms. Hernandez.

You had mentioned earlier that you had submitted certain information to the Gerson Lehrman Group about drug trials and other work you were involved in; is that right?

A. Yes.

Q. Did you identify yourself to the Gerson Lehrman Group as a member of the safety monitoring committee for the bapineuzumab trial?

A. Yes, I did.

Q. Did you consult with Mr. Martoma through the Gerson Lehrman Group about the bapineuzumab trial?

A. Yes, I did.

Q. Did there come a point when he asked you about any confidential information from the trial?

A. Yes.

Q. Do you recall when that was in relation to when you started

consulting?

A. I don't recall precisely, but it was sometime in the fall of 2006, I believe, fall of 2006.

Q. Do you recall how he initially asked you for confidential information about the drug trial?

A. I think the first time may have been a little earlier than I just said, but it was a message about vasogenic edema. He was referring to Phase I of the bapineuzumab trial, I think, but I wasn't sure whether it was about something else, but it was a kind of subtle way to find out about vasogenic edema. It should have triggered --

Q. Did you provide confidential information to Mr. Martoma about the drug trial?

A. I did not at that point, but I -- I didn't quite recognize it for what I think it was, which was an attempt to find confidential information.

Q. Did you ever provide him with confidential information?

A. Yes, later I did.

Q. How did it come about? What was the first confidential information you remember providing?

A. This came about by his persistently questioning me about one might expect to see as a side effect of treating -- treatment with bapineuzumab. And I gave him theoretical responses at first, but he persisted in wanting to know what really happened, and I finally slipped out what actually

happened. That's how it started.

Q. And what did you tell him?

A. I told him that with multiple antibodies, one might expect to see some non-specific effects primarily on joints, so that low back pain or headache or joint pain or other kinds of rheumatological consequences may occur, and he wanted to know whether they did occur in fact, and I let slip that, yes, they did, and then --

Q. Did you continue sharing confidential information about the drug trial thereafter?

A. Then I started sharing information about the drug trial thereafter.

Q. Were those just slips too?

MR. STRASSBERG: Your Honor, can we get a time frame as to when this supposedly happened?

THE COURT: Yes. Could you give us a time frame or elicit a time frame from the witness, please?

Q. Do you recall precisely when it was that you first began sharing confidential information with Mr. Martoma about the drug trial?

A. Not precisely. It was approximately in the fall to winter of 2006-7, but I can't be more specific than that, I'm sorry.

Q. Are you confident in your memory on the timing?

A. I'm approximately -- I'm giving you an approximation. I know it happened, but I can't tell you exactly when.

Q. So, once you began sharing confidential information with Mr. Martoma about the drug trial, did that continue?

A. Yes.

Q. I think you had described what you initially told him as a slip, is that correct, Dr. Gilman?

A. Yes.

Q. What about as you continued to provide him with confidential information?

A. At the end, I gave him more specific data as he requested.

Q. Did you believe you were permitted to give him that data at the time?

A. I didn't -- no, I did not.

Q. Did you give it to him accidentally?

A. Excuse me?

Q. Did you give it to him accidentally?

A. No -- at first I did, but then later as time went on, I gave it to him intentionally.

MR. DEVLIN-BROWN: If I could have just one moment, your Honor.

THE COURT: Yes.

(Pause)

Q. Do you recall any particular subjects that Mr. Martoma was interested in with respect to the drug trial?

A. He asked whether Mr. Martoma was interested in particular subjects, and my response was, yes, he was particularly

you receive other documents from Elan that were password protected?
A. Yes.
Q. How certain are you that the document you remember emailing him was the ICAD presentation?
A. I'm not absolutely certain.
Q. What is your best recollection as to when you sent him the ICAD presentation?
A. I'm not certain of the time I sent him the document.
Q. What is your best recollection?
MR. STRASSBERG: Objection, your Honor.
THE COURT: Overruled.
MR. STRASSBERG: Asked and answered.
A. My best recollection was the 17th of July.
Q. How confident -- are you confident that it was the 17th of July?
A. I'm not.
MR. STRASSBERG: Objection, your Honor. I'll withdraw the objection.
THE COURT: You may answer.
A. I'm not very confident of that.
Q. Are you confident it was before the ICAD presentation?
A. I'm reasonably confident but not certain.
Q. So, Dr. Gilman, after the lunch with Mr. Martoma on July 30 of 2008, did you hear from him again the rest of the summer?

A. I don't recall hearing from him again for the rest of the summer.
Q. Were you surprised by that at the time?
A. Yes, I was surprised by that.
Q. Why?
A. Well, I thought we were friends, and I thought he would be in touch just to say hello.
Q. Did there come a point where you reached out to him?
A. Yes.
Q. I'd like to show what's been marked for identification as Government Exhibit 235. Do you recognize this document, Dr. Gilman?
A. Yes, sir.
Q. What is it generally?
A. It's a message from me to him saying I haven't heard from you for awhile.
Q. Doctor, don't read it. Do you recognize it generally?
A. Yes, I do.
MR. DEVLIN-BROWN: The government offers 235.
MR. STRASSBERG: No objection.
THE COURT: Government Exhibit 235 is received.
(Government's Exhibit 235 received in evidence)
MR. DEVLIN-BROWN: May we publish it with the Court's permission?
THE COURT: You may.

Q. So, Dr. Gilman, what's the date of this email from yourself to Mr. Martoma?
A. September 26, 2008.
Q. Do you want to look a little more closely at the date line or we could make it bigger?
A. September 28, 2008, 12:02 p.m.
Q. And the subject?
A. "How are you?"
Q. So the email reads, "Hi Mat. I haven't heard from you in awhile and hope that is all well with you and your family. I hope that you have not been too terribly set back by the great turmoil in the markets."
Let me stop there. What's the great turmoil in the markets you're referring to?
A. Well, 2008 was a very difficult time for investment people. The market was roiling. I think that's the right word.
Q. Was what-ing?
A. Roiling. Roiling. Is that right?
Q. I don't know.
A. That's not what I do. I have my own way of roiling in government grants, but it was a tough time for the economy.
Q. Then you write, "Plus the disappointing drop in Elan stock after the combined effect of investor disappointment, short selling of the stock and the two additional cases of PML on Tysabri."

What are you referring to by two additional cases of PML on Tysabri?
A. Tysabri is a medication for the treatment of multiple sclerosis, and Tysabri was the most -- was and is the most effective medication to treat multiple sclerosis. Tysabri prevents the development of new lesions of multiple sclerosis by stopping the inflammatory response. However, it is so effective in preventing certain kinds of cells from entering the brain; namely, T-cells, that it allows viruses to enter the brain and that allows certain viruses, the JC virus to enter the brain and cause a terrible disease, an incurable disease, at that time incurable.
(Continued on next page)

Q. The disease is PML?
A. Yes.
Q. Do you recall if these two additional cases of PML you are referring to occurred, or were announced before or after your ICAD presentation?
A. I think after.
Q. You end the email with, "Anyway, no need to call, I have nothing new; I just wonder how you are faring."
Did you make any appointments, or did you have any arrangements to see Mr. Martoma in person after this email of September 28, 2008?
A. I didn't make any. He made, as I recall, an appointment through GLG to meet me at a meeting in Seattle in the fall.
MR. DEVLIN-BROWN: If we could publish what's in evidence as Government Exhibit 718?
THE COURT: Yes.
BY MR. DEVLIN-BROWN:
Q. And if we could -- just at the bottom of this calendar, it says April 29, 2009. Do you see that, Dr. Gilman?
A. Yes.
MR. DEVLIN-BROWN: If we could go to the next page, Ms. Hernandez. And the next page.
Q. And I want to direct your attention, Dr. Gilman, to the entry from 3:30 to 4:30. How does that read?
A. "Meet Mat Martoma outside the lecture room before Reisa

Sperling's presentation."
That was in the spring.
Q. I believe it was April 29, 2009 from this calendar.
A. OK. I thought it was the fall.
Q. Was this the planned meeting to which you were referring earlier?
A. It is, yes. I thought it was the fall but it was the spring.
Q. Did Mat Martoma meet you outside the lecture room?
A. No.
Q. Dr. Gilman, after July 30, 2008, did you ever see Mat Martoma again until you saw him in court on Friday?
A. I don't believe so.
MR. DEVLIN-BROWN: Just one moment, your Honor.
THE COURT: Yes.
(Pause)
MR. DEVLIN-BROWN: No further questions.
THE COURT: All right. Ladies and gentlemen, we are going to take a brief recess. We will take about ten minutes. Don't discuss the case. Keep an open mind. There is more evidence. We will be back to you shortly.
THE CLERK: All rise.
(Continued on next page)

(Jury not present)
THE COURT: Please be seated.
All right. Mr. Strassberg, you had something you wanted to raise?
MR. STRASSBERG: Yes. If we could just have one moment, your Honor?
(Pause)
Actually, related to that, I would ask your Honor that -- the witness has counsel, I believe, several members of his legal team in the audience, and I would ask that counsel not be advising him and conferring with him on the subject matter of his testimony while he is on cross.
THE COURT: Do you want to do it at the bench? Maybe that would be the easiest thing. Do you want to raise your issue at the bench?
MR. STRASSBERG: Yes. Although I think on that issue, I would want it to be of things that are happening with respect to cross. In general, I think it would be inappropriate for them to be --
THE COURT: Well, the cross hasn't started yet so he's absolutely able to speak with his lawyer now.
MR. STRASSBERG: Right. I understand that, your Honor. I'm saying for the cross that is about to begin.
The two issues that I wanted to raise with your Honor relate to simply evidentiary issues.

The first is the admission of certain Elan statements to investors, public statements that they made to the press. We have an agreement with the government not to dispute the authenticity of those statements. These will be statements that will relate directly to certain claims with respect to information that Dr. Gilman has testified he believed was confidential, particularly with respect to safety disclosures that the company was making. We want to be able to use those on Dr. Gilman's direct examination. So --
THE COURT: In other words, you want to show him these and ask him whether he has seen them, is that your point?
MR. STRASSBERG: Well, in part, your Honor, yes, and also contrast those with what he was claiming was confidential information that he was disclosing at the time.
THE COURT: All right. Do you want to be heard?
MR. DEVLIN-BROWN: Yes, your Honor.
The government did enter a stipulation to not dispute the authenticity of any of these statements. And we made express in the stipulation, though, that we would not necessarily agree that they were appropriately admitted through the cross of any government witness, as opposed to potentially the defense's case.
I think our view of it is this. If there is a recording or a statement that Dr. Gilman is on, or there is evidence that Dr. Gilman heard or saw that statement, or if he

Gupta, Dr. Gilman?
A. One consultation, sir.
Q. Do you remember being asked about someone named Ajay?
A. Yes.
Q. And let's filter Government Exhibit 600 for Ajay. How many consultations are there for Ajay?
A. I see one here, sir.
Q. Is there an Ajay Mantha as well, Ms. Hernandez? How many consultations are on the screen for Ajay Mantha?
A. Looks like six or so.
Q. How many of those relate to Alzheimer's -- do they all relate to Alzheimer's disease?
MR. STRASSBERG: Objection, your Honor. To the extent he is asking for his memory, I have no objection. But as that appears to be the question, I think he was reading the document.
THE COURT: Are you asking him how many are on Government Exhibit 600 or are you asking him for his recollection?
MR. DEVLIN-BROWN: How many are on Government Exhibit 600, your Honor.
THE COURT: That's in evidence.
Q. We don't need to go through every single one. Let's do one more. Do you remember being asked about someone named Guha?

A. Yes.
Q. How many consults do you see with Guha on Government Exhibit 600?
A. I see one.
Q. Now, do you recall that when Mr. Strassberg was asking you questions about people you consulted with yesterday, there were some people that you had a memory of besides Mat Martoma?
A. I think there were some, yes.
Q. Let me ask you about someone named Tom Brown of Millennium?
A. Yes.
Q. Do you remember being asked questions about him?
A. Yes, I remember Tom Brown very well.
Q. What do you remember about Tom Brown?
A. I remember Tom Brown as being in London at a -- at a firm, and I remember him being a delightful gentleman, very talkative, a former chess champion player, and the consultations were delightful, but he was extremely talkative.
Q. If we could filter Government Exhibit 600, Ms. Hernandez, by Tom Brown, please. Let's look down the screen. How many consultations do you have with Tom Brown?
THE COURT: Let me speak with my deputy for a moment.
(Pause)
Q. So we've shrunk Government Exhibit 600 on the screen Dr. Gilman, but am I right that there is one, two, three, four, five, six, seven, eight, nine, ten consults for Tom Brown?

A. Yes, ten or 11.
Q. Dr. Gilman, I believe you were asked on cross-examination about how many consultations you had with Mat Martoma. Do you remember that?
A. Yes.
Q. How many consultations would you estimate you had with Mat Martoma?
THE COURT: Do you mean in total over the entire time period?
Q. In total, let's say between -- yes, over the entire time period, over the entire time period you dealt with GLG.
A. I think it was about 60 or thereabouts.
Q. Six-zero did you say?
A. Six-zero, yes.
Q. Could we filter client contact Mat Martoma. I don't think we need to or are able to count all of these, but you haven't counted them up yourself, have you, Dr. Gilman?
A. No, sir.
Q. Do you think anyone came close to Mr. Martoma in terms of the number of consults you had?
A. No, I don't believe so.
Q. We could take that off the screen, Ms. Hernandez. Other than having more consultations with Mr. Martoma than other clients with GLG, was your relationship with him different than with other clients?

A. Yes, it was different from my relationship with other clients.
Q. In what way?
A. In the very beginning, he was personable and seeking friendship with me initially; and then as time went on, he was persistently seeking non-public information. That was true from the time of perhaps our sixth or seventh meeting, conversation, that is.
Q. Was your personal relationship different with Mr. Martoma than any of your other clients?
A. Yes, it was.
Q. How was it different?
A. He wanted for us to get together at the public meetings at the American Academy of Neurology, for example, and have coffee or to meet. I was very wary of this at first because I thought we were going beyond the client/advisor relationship, but with time, I began to like him. He was personable, and he, unfortunately, reminded me of my first son in his inquisitiveness, his brightness; and, sadly, my first son was very bright also and committed suicide.
Q. In terms of science, did Mr. Martoma's knowledge of science stand out in any way?
A. Yes.
Q. From the other people that had been mentioned?
A. Yes, he seemed much brighter and more versed in science